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No. 06-657

IN THE

Supreme Court of the United States

RENT-A-CENTER, INC.,

Petitioner,

v.

HILDA PEREZ, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of New Jersey

REPLY BRIEF FOR PETITIONER

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29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR PETITIONER

Respondent opposes certiorari on three grounds, none of which is substantial. She first contends that the Supreme Court of New Jersey's reversal of a grant of summary judgment is unreviewable under 28 U.S.C. § 1257. This Court, however, has adopted a pragmatic approach to § 1257's finality requirement specifically so that it can review cases, such as this one, in which federal issues implicating important federal policies might otherwise evade review. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975). She also argues that Rent-A-Center waived its federal due process claim because it did not raise the issue before the violation occurred. This Court, however, does not require parties to raise issues before they are justiciable; instead, this Court has repeatedly granted certiorari when, as here, a state supreme court renders an unexpected interpretation of state law and the petitioner raises the newly created federal issue at the first opportunity in a petition for rehearing. Finally, respondent attacks the factual predicate for Petitioner's due process claim, asserting that the New Jersey Supreme Court's decision did not announce new and unforeseeable rules. This contention is belied both by the decision below, which acknowledged that its interpretation was "not a perfect fit with the words of the statute," Pet. App. 22a, and which abrogated a common-law doctrine it had previously described as "firmly imbedded in this state," *Sliger v. R.H. Macy & Co.*, 283 A.2d 904, 906 (N.J. 1971), and by the court's eventual judgment, which made the ruling prospective as to non-parties. If, as respondent suggests, the decision below was dictated by precedent and the text of the statute, why did the state court so strangely limit its ruling's retroactive effect only to Rent-A-Center?

I. This Court Has Jurisdiction Under *Cox Broadcasting*

Respondent contends that this Court lacks jurisdiction to consider this case because the decision below is not a "[f]inal judgment" within the meaning of 28 U.S.C. § 1257(a).

Opp'n 14. To be sure, Rent-A-Center continues to contest liability in state court. But as respondent acknowledges, the Supreme Court of New Jersey has definitively rejected Rent-A-Center's federal due process claim. This Court has jurisdiction to review that federal-law ruling under *Cox Broadcasting v. Cohn*.

Respondent notes that § 1257(a) establishes "a firm final judgment rule," *Jefferson v. City of Tarrant, Ala.*, 522 U.S. 75, 81 (1997), but this Court has not administered the finality requirement of § 1257 in the "mechanical fashion" that respondent urges. *Cox Broad.*, 420 U.S. at 477. Instead, this Court follows a "pragmatic approach" in determining finality, *id.* at 486, and has repeatedly granted review when "additional proceedings would not require the decision of other federal questions that might also require review by the Court," and when "immediate rather than delayed review would be the best way to avoid 'the mischief of economic waste and of delayed justice'"—conditions each satisfied here.[1] *Id.* at 477–78. Indeed, this Court often enough has reviewed state supreme court decisions reversing grants of summary judgment. In *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990), for example, this Court granted certiorari where, as here, the trial court awarded summary judgment, a state court of appeals affirmed, and then the state's supreme court reversed. *Id.* at 136–37 (considering whether the Employment Retirement Income Security Act of 1974 ("ERISA") preempted a Texas common-law claim); *see also Am. Oil Co. v. Neill*, 380 U.S. 451, 455 (1965) (addressing the constitutionality of a state taxing scheme after the Idaho Supreme Court reversed a grant of summary judgment). Indeed, in *Cox Broadcasting* itself, this Court granted certiorari where the Georgia Supreme Court reversed an award of

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[1] *Jefferson* did not require literal finality. Instead, *Jefferson* applied *Cox Broadcasting*'s pragmatic approach and found review inappropriate because, "[f]ar from terminating the litigation," the federal issue affected "only two of the four counts" in the complaint. 522 U.S. at 81.

summary judgment. 420 U.S. at 475, 485 (addressing the constitutionality of a state-law privacy claim).

This case meets all of the requirements of *Cox Broadcasting*'s fourth category, which permits review of interlocutory state-court rulings "where the federal issue has been finally decided," reversal of the ruling "would be preclusive of any further litigation on the relevant cause of action," and refusal to review the ruling "might seriously erode federal policy." 420 U.S. at 482–83.

Respondent apparently concedes that the federal issue was finally decided. Opp'n 16; *see also Chambers v. Miss.*, 410 U.S. 284, 290 n.3 (1973) (issue finally decided "despite the State Supreme Court's failure to address the constitutional issue"). She argues, though, that reversal of the state supreme court's ruling on Rent-A-Center's federal due process claim would not preclude *all* further litigation, because her claims for injunctive relief would remain live. *Id.* But that argument simply highlights the fact that the federal due process claim challenging the retroactive application of new rules is entirely separate from the validity of those new rules under state law. The federal issue is "independent of, and unaffected by," the question "'with which it happens to be entangled,'" namely, whether injunctive relief is warranted. *Local No. 438 Constr. & Gen. Laborers' Union v. Curry*, 371 U.S. 542, 549 (1963); *see also Cox Broad.*, 420 U.S. at 483 (identifying *Curry* as a paradigmatic example of the fourth category). Moreover, a reversal would end the litigation "for all practical purposes," *see Curry*, 371 U.S. at 551; *Cox Broad.*, 420 U.S. at 483, because the new rules announced by the Supreme Court of New Jersey will govern Rent-A-Center's future conduct in New Jersey, whether or not an injunction is imposed.

This Court has recognized a wide variety of federal policies, based in statutes as well as constitutional provisions, as important enough to warrant immediate review. In *Ingersoll-Rand*, for example, this Court noted that "'[t]he very passage of ERISA demonstrates the great significance attached to in-

come security for retirement purposes'" and granted certiorari. 498 U.S. at 136 (alternation in original). Similarly, in *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1988), the Court reviewed "[t]he federal question whether [an] additional workers' compensation award [was] barred by federal law" because the state court decision "might seriously erode federal policy in the area of nuclear production." *Id.* at 179. And this Court has also, in its pragmatic approach to finality, granted certiorari in cases that fall within *Cox Broadcasting*'s fourth category without expressly stating what federal policy was being preserved. *See Hudson Distribs., Inc. v. Eli Lilly & Co.*, 377 U.S. 386, 389 n.4 (1964); *see also Cox Broad.*, 420 U.S. at 484 n.11 (describing *Hudson*).

Providing citizens with "an opportunity to know what the law is and to conform their conduct accordingly" is a fundamental federal policy, "'as ancient as the law itself,'" that is "deeply rooted in [this Court's] jurisprudence," *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 & n.17 (1994), and is at least as important as the statutory policies vindicated in *Ingersoll-Rand* and *Goodyear Atomic*. "Indeed, the point of due process—of the law in general—is to allow citizens to order their behavior." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003). To paraphrase *Cox Broadcasting*, "a failure to decide the question now will leave the [rent-to-own industry] in [New Jersey] operating in the shadow of the civil and criminal sanctions of a [new] rule of law and a [new interpretation of a] statute" where the constitutionality of its retroactive application "is in serious doubt." 420 U.S. at 486. The fundamental federal policy of due process, which is directly tied to the public's confidence in our system of justice, will be seriously eroded as long as the decision below, which is "'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,'" *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964), is allowed to stand.

II. Rent-A-Center Raised Its Federal Due Process Objection At The First Opportunity And Therefore Did Not Waive That Argument

Respondent also argues that Rent-A-Center waived its federal due process claim by raising it for the first time in its petition for rehearing. Opp'n 17. Rent-A-Center, however, raised this argument well before its petition for rehearing, warning both the Appellate Division and the New Jersey Supreme Court in opening briefs both that statutes must give notice in order to avoid "run[ning] afoul of procedural due process protections" and that any ambiguities in a criminal statute "must be construed strictly in favor of those accused of violating the law" in order to avoid violating due process. Pet. App. 93a–94a; *see also* Pet. 12 n.5.[2]

In any event, respondent's waiver argument fails for two reasons. First, one cannot waive a claim *before* it is ripe for adjudication. Rent-A-Center's due process rights were first violated when the New Jersey Supreme Court issued its order applying new rules retroactively to Rent-A-Center's already completed conduct. In order for a claim to be ripe for review under New Jersey law, a party seeking review must be able to show either injury or "a substantial likelihood of harm," for New Jersey courts "will not render advisory opinions or function in the abstract." *Ocean County Bd. of Realtors v. Borough of Beachwood*, 590 A.2d 736, 738 (N.J. Super. Ct. Law Div. 1991); *cf. Tex. v. United States*, 523 U.S. 296, 300 (1998) ("A claim is not ripe for adjudication if it rests upon

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[2] Because these principles are identical under both state and federal law, it is inconsequential that Rent-A-Center relied on state law in its anticipatory warnings to the state courts. Where a right under state law is coextensive with the corresponding right under federal law, the identification of the state-law claim will suffice to present to the state court both the state and the federal issue. *Jackson v. Edwards*, 404 F.3d 612, 621 (2d Cir. 2005); *see also Howell v. Miss*, 543 U.S. 440, 445 (2005) (per curiam) (reserving on question whether presentation of state law claim fairly presents identical claim under federal law).

contingent future events that may not occur as anticipated, or indeed may not occur at all.") (internal quotation marks omitted). Similarly, a cause of action does not accrue until an actual injury has occurred. *White v. Mattera*, 814 A.2d 627, 631–32 (N.J. 2003). As this case came to the Supreme Court of New Jersey, the possibility that the state court would reverse the decision below, abrogate the "firmly imbedded" time-price doctrine, *see Sliger*, 283 A.2d at 906, and apply its new rule retroactively to the parties was, at most, conjectural. Once this violation occurred, Rent-A-Center took the first available opportunity to contest this due process violation by filing a petition for rehearing that squarely addressed the federal issue. Pet. App. 97a–104a.

Second, "this Court has held federal claims to have been adequately presented even though not raised in lower state courts when the highest state court renders an unexpected interpretation of state law or reverses its prior interpretation." *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 86 n.9 (1980). In *PruneYard*, the petitioners had relied in lower state courts on a California Supreme Court decision that permitted privately owned shopping centers to ban publicly expressive activity on their property. *Id.* at 77–79. The petitioners raised federal constitutional arguments, however, before the state supreme court, which unexpectedly reversed its prior rule. This Court considered the federal issues preserved, for "[i]t was not until that time that [the petitioners] could have reasonably expected that the validity of the earlier [rule] would be questioned." *Id.* at 87 n.9. *See also Richards v. Jefferson County, Ala.*, 517 U.S. 793, 797 n.3 (1996) ("Because petitioners raised their due process challenge to the application of res judicata in their application for rehearing to the Alabama Supreme Court, that federal issue has been preserved for our review."); *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 678 (1930) (concluding that "[t]he additional federal claim thus made was timely, since it was raised at the first opportunity" by the filing of a petition for rehearing with the state supreme court). In short, "[t]here is no doubt that the federal claim was timely if the ruling of the

state court could not have been anticipated and a petition for rehearing presented the first opportunity for raising it." *Herndon v. State of Ga.*, 295 U.S. 441, 444 (1935); *see also Great N. Ry. Co. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 366–67 (1932); *Saunders v. Shaw*, 244 U.S. 317, 320 (1917) ("[W]hen the act complained of is the act of the supreme court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here.").

By raising the due process retroactivity issue at its first opportunity by filing a motion for rehearing, Rent-A-Center provided the state court "'a fair opportunity to address the federal question that is sought to be presented here,'" *Adams v. Robertson*, 520 U.S. 83, 87 (1997) (quoting *Webb v. Webb*, 451 U.S. 493, 501 (1981)), and it did so "with 'fair precision and in due time,'" *id.* (quoting *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928)). Rent-A-Center's motion for rehearing set out the principles governing retroactive application of new rules and explained how the decision below directly conflicted with this Court's decision in *Bouie*. Pet. App. 97a–104a. The fact that the New Jersey Supreme Court chose not to attempt to provide a reasoned explanation for its failure to follow *Bouie* does not deprive this Court of jurisdiction to correct that error. *See Chambers*, 410 U.S. at 290 n.3 (explaining that a state court's refusal to address a properly presented federal claim does not render its decision unreviewable).

III. The Decision Below Violated Rent-A-Center's Due Process Rights And Warrants Review

Respondent nowhere disputes the exceptional importance of the question presented. Nor does she anywhere contest that this Court's decisions—and those of several courts of appeals—establish that the Due Process Clause limits the authority of state courts to apply new state-law rules retroactively. Instead, respondent primarily attacks the state-law

predicate for Rent-A-Center's due process claim, drawing upon unpublished interlocutory trial court rulings and dicta buried in a footnote to bolster her assertion that the decision below was compelled by "the plain language of the state statutes at issue" and "did not announce any new or unforeseeable rule of law." Opp'n 24, 25. Respondent's vision of the decision below, however, is refuted by the decision itself.

The state supreme court here candidly admitted that the statutory text was not its principal interpretive guide; its desired interpretation was "not a perfect fit with the words of the statute." Pet. App. 22a. The state court, therefore looked to "'[t]he spirit of the legislative direction'" and "'evident legislative design'" rather than the "'literal sense of the [statute's] terms.'" Pet. App. 23a, 24a. This results-oriented interpretive methodology cannot be reconciled with respondent's view that the "plain language of the statute" admitted only of her interpretation.

Moreover, the state supreme court's actions on rehearing—first making its ruling prospective, and later amending the order to be retroactive only as to the parties—make it absolutely clear that the state court recognized that its ruling fundamentally changed the law. While respondent is correct that under New Jersey law, "prospective application of a court's ruling is a matter of discretion," Opp'n 19 n.8, that discretion is appropriately exercised only when the holding in question represents a "significant change in the law." *Scafidi v. Seiler*, 574 A.2d 398, 408 (N.J. 1990). *See also Montells v. Haynes*, 627 A.2d 654, 660 (N.J. 1993) ("[p]rospective application is appropriate when a decision establishes a new principle of law" (citing *Chevron Oil v. Huson*, 404 U.S. 92 (1971)). Prospective application is "particularly appropriate when . . . a member of the public could reasonably have 'relied on a different conception of the state of the law.'" *Montells*, 627 A.2d at 662.

By making its judgment "prospective" as to non-parties, Pet. App. 43a, the Supreme Court of New Jersey necessarily acknowledged that it had effected a "significant change in the

law," *Scafidi*, 574 A.2d at 408, and that "a member of the public could reasonably have 'relied on a different conception of the state of the law,'" *Montells*, 627 A.2d at 662. It could not otherwise have made its ruling partially prospective. *See State v. Knight*, 678 A.2d 642, 651 (N.J. 1996) ("Our cases have recognized that if a ruling does not involve a 'departure from existing law,' the retroactivity question never arises and our power to limit the retroactive effect of a decision is not implicated.") (quoting *State v. Burstein*, 427 A.2d 525, 529 (N.J. 1981)). Respondent thus could be correct in her assertion that the state court "did not announce any new or unforeseeable rule of law," Opp'n 25, only if the Supreme Court of New Jersey had erred in applying its retroactivity jurisprudence. But this Court "presum[es] that state courts know and follow the law." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002). That presumption of regularity compels this Court to reach exactly the conclusion that respondent rejects: that, on rehearing, the state supreme court concluded that its decision had worked a "significant change in the law," *Scafidi*, 574 A.2d at 408. And having discerned the state supreme court's view of the state-law implications of its holding, this Court is not at liberty to disregard it. *See Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 488 (1976) ("We are, of course, bound to accept the interpretation of [the State's] law by the highest court of the State."); *see also Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 111–12 (1980) ("this Court accords 'respectful consideration and great weight to the views of the state's highest court' on matters of state law").

To the extent that respondent argues that the due process right of fair warning has application only in criminal adjudications (*see* Opp'n 23–24), she is certainly incorrect. Four terms ago, this Court confirmed that "[t]he Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor." *State Farm*, 538 U.S. at 416. And in *Harper v. Virginia Department of Taxation*, 509 U.S. 86 (1993), this Court

held that "'basic norms of constitutional adjudication'" required that whatever retroactivity rules apply in the criminal context perforce applied in the civil context as well. *Id.* at 97 (quoting *Griffith v. Ky.*, 479 U.S. 314, 322 (1987)). To be sure, *Bouie* arose in the context of a criminal case, but *State Farm* and *Harper* demonstrate that the due process right to fair warning on which *Bouie* turned has equal application in civil cases.[3]

Finally, respondent lampoons Rent-A-Center's argument as advocating a "bottomless expansion of the concept of due process." Opp'n 26. This is a merits contention, and it is wrong is any event. Rent-A-Center seeks only to apply in a civil case the due process principle announced in *Bouie*—that new rules "'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,'" cannot be applied retroactively. *Bouie*, 378 U.S. at 354. If the decision below is left undisturbed, it is the ability of state courts to revise rights and settled expectations through outlandish, results-oriented judicial manipulation that will be "bottomless."

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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[3] Contrary to respondent's suggestion (at 24–25), neither *Harper* nor *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749 (1995), requires state courts to apply new and unforeseeable rules of state law retroactively in civil cases. Those cases turned on the Supremacy Clause, rejecting the proposition that a *state* court could give a new rule of *federal* law announced by the Supreme Court only prospective application. *See Harper*, 509 U.S. at 94–100; *Reynoldsville Casket Co.*, 514 U.S. at 752–53.

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